APR 1

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1469

JOANNE ERSKINE COSE, *Petitioner*

v.

LEROY EDWARD COSE, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION

Allen L. Jewell
HAHN, JEWELL & STANFILL
542 W. Second Avenue
Anchorage, Alaska 99501
Counsel for Respondent

April 15, 1980

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JOANNE ERSKINE COSE, *Petitioner*

v.

LEROY EDWARD COSE, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Leroy Edward Cose, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Alaska Supreme Court in this case.

OPINION BELOW

The opinion of the Alaska Supreme Court is reported at 529 P. 2d 1230 (1979). (Pet. 3a-8a).

JURISDICTION

Although jurisdiction is technically available to the petitioner in this case, respondent respectfully requests that this Court not exercise its discretionary power where the finality of a judgment has so lately been disregarded for the sole purpose of affording this petitioner a second opportunity to seek review.

The opinion of the Alaska Supreme Court was issued March 30, 1979. The timely petition for rehearing and amended petition for rehearing were denied on June 18, 1979 (Pet. 11a). The mandate of the Alaska Supreme Court was issued June 19, 1979. (Pet. 9a-10a). On September 21, 1979, Mr. Justice Rehnquist denied a timely application for an extension of time in which to file a petition for writ of certiorari on this question. (App. A, *infra*). A subsequent application to the Alaska Supreme Court to accept a second petition for reconsideration was denied on October 15, 1979. (App. B, *infra*). Thereafter, on December 19, 1979, a request for full court reconsideration of the request to accept a second petition for reconsideration was granted for the express purpose of affording petitioner a second opportunity to file a petition for writ of certiorari with this Court. (Pet. 13a-14a, 16a).

QUESTION PRESENTED

Whether Article VI, Clause 2 of the United States Constitution prohibits the division of military retired pay in a divorce action.

CONSTITUTIONAL PROVISIONS AND STATUTES

See Appendix C.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set forth in petitioner's brief (Pet. 3, 4) in all respects but one.

The Alaska Supreme Court did not apply a presumption against divisibility of military retired pay as asserted by petitioner.

Rather, the Alaska Supreme Court found *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 59 L. Ed. 2d 1 (1970) to be controlling and ruled that the Federal Supremacy Clause prohibits application of state property settlement concepts relating to divorce proceedings to military retired pay. 592 P. 2d at 1232.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Writ Should Not Be Granted Because The Question Raised In The Petition Is Controlled By Past Decisions Of This Court.

In *Hisquierdo v. Hisquierdo,* supra, this Court ruled that the Federal Supremacy Clause precluded California from dividing retirement benefits available under the Railroad Retirement Act (45 U.S.C. §231 et. seq.) through application of its community property principles. Respondent submits that this decision controls the issue raised by petitioner.

As *Hisquierdo v. Hisquierdo,* supra, makes clear, retirement benefits payable under the Railroad Retirement Act are not attachable (45 U.S.C. §231m) except that they are available to secure child support and alimony payments (42 U.S.C. §659). Congress specifically excluded

the division of community property from its definition of alimony for purposes of 42 U.S.C. §659 (42 U.S.C. §662(c)) and any right of the spouse of retiree to an annuity under the Railroad Retirement Act is lost after divorce. (45 U.S.C. §231d(c)(3)).

The parameters surrounding respondent's retirement benefits are substantially similar to those outlined in *Hisquierdo v. Hisquierdo.* Military retired pay is not available for attachment under the doctrine of sovereign immunity with the same important exception. *Buchanan v. Alexander,* 4 Haw. 20, 45 U.S. 20, 11 L.Ed. 857 (1846), *Applegate v. Applegate,* 39 F. Supp. 887 (D.C. 1941), *Arnold v. United States,* 331 F. Supp. 42 (D.C. 1971). 42 U.S.C. §659 operates to allow attachment for purposes of securing child support or alimony payments and again, the division of community property is not encompassed by Congress's definition of alimony (42 U.S.C. §662(c)) for purposes of 42 U.S.C. 659. Like the Railroad Retirement Act, any entitlement of a military retiree's spouse to an annuity is lost after divorce. (10 U.S.C.§1434(c)).

Respondent submits that the Alaska Supreme Court gave full consideration to the issue raised in the petition and decided it correctly. Its decision comports not only with *Hisquierdo v. Hisquierdo,* supra, but also with *Free v. Bland,* 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed. 2d 180 (1962), and *Wissner v. Wissner,* 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950). This Court noted that had Congress elected to allow garnishment of military retired pay for purposes of property division in state court divorce proceedings it could have done so.[1] *Hisquierdo v. Hisquierdo,* supra, at 59 L.Ed. 2d at 16.

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[1]See Pub. L. 95-366, 92 Stat. 600 (1978)

2. The Writ Should Not Be Granted Because The Issue Raised In The Petition Is Of Minor Importance.

Respondent acknowledges that state courts are asked to address the issue raised in the petition. However, the question is of minor importance when viewed in light of the underlying issue initially prompting the inquiry.

The underlying issue that frequently seeks resolution is support of the divorced spouse who, following a marriage of some duration, is not otherwise eligible for retirement benefits.

The decisions reflect two results, one entitling the divorced spouse to a share of the retirement benefits, *In Re Fithian,* 10 Cal. 3d 592, 517 P.2d 449, 11 Cal. Rpt. 369 Cert. denied, 419 U.S. 829, 95 S.Ct. 41, 42 L.Ed. 2d 48 (1974), the other precluding any such division. *Hisquierdo v. Hisquierdo,* supra. In the latter event the divorced spouse is protected in that she can seek the equivalent of such a benefit with an application for spousal support. *Hisquierdo v. Hisquierdo,* supra, at 59 L.Ed. 2d page 14. Moreover, since military retired pay is viewed as income (26 U.S.C. §61(a) (11) it is appropriate to consider military retired pay in determining the amount awarded for spousal support.

3. The Writ Should Be Denied Because The Issue Raised In The Petition Is Not Yet Ripe For Review.

Since *Hisquierdo v. Hisquierdo,* supra, the highest courts of the following states have addressed the question of divisibility of military retired pay:

Arizona	*Czarnecki v. Czarnecki,* 123 Ariz. 466, 600 P.2d 1098 (1979).
California	*Henn v. Henn,* _____ Cal. 3d, _____, _____ P. 2d _____, 161 Cal. Rptr. 1196 (1980).
New Mexico	*Stephens v. Stephens,* 91 N.M. 1, 595 P. 2d 1196 (1979).

Although these three decisions ruled that retired military pay is divisible, it is of interest to note that *Hisquierdo v. Hisquierdo,* supra, and the supremacy argument contained therein received little or no discussion by these courts.

If this matter warrants review, it should be reserved for a future case where this court will have a wider variety of views from courts of last resort that more extensively discuss the supremacy argument and this court's holding in *Hisquierdo v. Hisquierdo,* supra.

CONCLUSION

For these reasons the petition for writ of certiorari seeking review of the opinion of the Alaska Supreme Court in this case should be denied.

Respectfully submitted,

Allen L. Jewell
HAHN, JEWELL & STANFILL
542 W. Second Avenue
Anchorage, Alaska 99501
Counsel for Respondent

APPENDIX

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

September 24, 1979

Max F. Gruenberg, Jr., Esquire
909 West Ninth Street
Suite 230
Anchorage, Alaska 99501

Re: Joanne Erskine Cose v.
Leroy Edward Cose A-243

Dear Mr. Gruenberg:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"Denied
9/21/79
WHR"

Please notify opposing counsel of this action.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By Patricia A. Dean
Assistant Clerk

th
I certify that a copy of the foregoing has been sent to Allen Jewell, Esq. at his address of record this 3rd day of October, 1979.

/s/ Max F. Gruenberg, Jr.

APPENDIX B

IN THE SUPREME COURT FOR THE STATE OF ALASKA

LEROY EDWARD COSE, *Appellant/Cross-Appellee*

v.

JOANNE ERSKINE COSE, *Appelle/Cross-Appellant.*

File Nos. 3243/3244

Order

On consideration of appellee/cross-appellant's motion for acceptance of second petition for reconsideration, filed October 5, 1979,

IT IS ORDERED:

The motion is denied. Entered at the direction of an individual justice at Juneau, Alaska, October 15, 1979.

CLERK OF THE SUPREME COURT

Connie Staska
Chief Deputy Clerk

cc: Counsel, Justices

APPENDIX C

Article VI, Clause 2 of the United States Constitution reads:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

10 USC §3911	(Pet. 17a)
10 USC §3929	(Pet. 17a)
10 USC §3991	(Pet. 17a, 18a)

10 USC §1434(c) reads in the relevant part:

> ". . . An election of an annuity under clause (3) of subsection (a) shall provide that no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce."

26 USC 61 (a)(11) reads in the relevant part:

> "(a) General definition. Except as otherwise provided in this sub-title, gross income means all income from whatever source derived, including (but not limited to) the following items: . . . (11) Pensions; . . ."

42 USC §659 reads in the relevant part:

> "(a) Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

42 USC §662 reads in the relevant part:

> "(c) The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accorance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."